

September 2, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-30 is available for public comments under this procedure. It was requested by counsel, Michael Boos, on behalf of Citizens United.

Proposed Advisory Opinion 2004-30 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 9, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on September 8, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

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To obtain copies of documents related to AO 2004-30, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 2, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Amy L. Rothstein
Staff Attorney

Subject: Draft AO 2004-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 9, 2004.

Attachment

1 ADVISORY OPINION 2004-30

2 Michael Boos, Esq.
3 Vice President & General Counsel
4 Citizens United
5 1006 Pennsylvania Avenue, S.E.
6 Washington, D.C. 20003

DRAFT

8 Dear Mr. Boos:

9 This responds to your letter dated July 8, 2004, as supplemented by your letter of
10 July 22 and additional communications, requesting an advisory opinion concerning the
11 application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and
12 Commission regulations to Citizens United’s plans to buy television time to air a
13 documentary film about presidential candidate John Kerry and his vice-presidential
14 running mate, John Edwards, within sixty days before the general election on November
15 2, 2004. You also ask about the application of the Act and Commission regulations to
16 Citizens United’s plans to advertise both the film and a book about Mr. Kerry on
17 television and radio within sixty days before the upcoming general election.

18 ***Background***

19 The discussion below provides information about Citizens United, Citizens
20 United’s proposed documentary film and proposed advertisements for the film and book,
21 and Citizens United’s assertion that it is a member of the news media.

22 ***Citizens United.*** Citizens United is a Virginia non-stock corporation exempt from
23 Federal taxes under Section 501(c)(4) of the Internal Revenue Code. Citizens United was
24 established in 1988 “to promote social welfare through informing and educating the
25 public on conservative ideas and positions on issues, including national defense, the free

enterprise system, belief in God, and the family as the basic unit of society.”¹ Citizens United’s Mission Statement states that Citizens United seeks to accomplish this goal “[t]hrough a combination of education, advocacy, and grass roots organization.”

In support of your advisory opinion request, you provided the Commission with a copy of an affidavit that was executed by David N. Bossie, the president of Citizens United, and used in litigation challenging the Bipartisan Campaign Reform Act (“BCRA”).² According to the Bossie Affidavit, Citizens United “represents its views, and the views of its members and contributors, on legislative and public policy issues before federal, state, and local officials and the general public.” Bossie Affidavit at 2. Citizens United “engages in, including spending significant funds for, communications on such issues during campaigns for election to federal office.” *Id.* The district court in *McConnell* recognized that “the principal function [of Citizens United] is the dissemination of information concerning [its] beliefs and advocacy.”³

You state that Citizens United accepts donations from corporations and individuals. It is not owned or controlled by any political party, political committee or candidate committee.

Citizens United is an incorporated membership organization for purposes of the Act, and it has established a separate segregated fund (“SSF”), the Citizens United Political Victory Fund. Citizens United’s SSF has contributed to the re-election campaign of President Bush, and you state that it has communicated its support of the

¹ Citizens United Articles of Incorporation, Art. II(A).

² Declaration of David N. Bossie, President of Citizens United, on behalf of Plaintiffs Citizens United and Citizens United Political Victory Fund (“Bossie Affidavit”), in *McConnell v. Federal Election Commission*, 251 F. Supp.2d 176 (D.D.C. 2003), *aff’d in part and rev’d in part*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619 (2003) (“*McConnell*”).

³ *McConnell*, 251 F. Supp.2d at 224.

1 Bush re-election campaign to members of its restricted class. You indicate, however, that
2 Citizens United does not wish to finance any television broadcasts of the proposed film,
3 or any of the proposed advertisements at issue here, through its SSF. Furthermore, you
4 state that Citizens United does not intend to establish a new SSF for the purpose of
5 making these communications.

6 ***The Film.*** You state that Citizens United plans to produce and market a
7 documentary film that will focus on the lives and careers of presidential candidate John
8 Kerry and vice-presidential candidate John Edwards (the “Film”). Although still in the
9 planning stage, you anticipate that the Film will be between 60 and 80 minutes in length,
10 that it will include numerous visual images of Senator Kerry and Senator Edwards, and
11 that it will mention both candidates’ names throughout. You state that the Film may also
12 include visual images and the names of other Federal candidates but will not expressly
13 advocate the election or defeat of any Federal candidate.

14 You state that Citizens United will own the copyright for the Film, and that
15 Citizens United will be responsible for the Film’s content. Citizens United plans to make
16 the Film available to the public in three different ways: through movie theaters; through
17 DVD and VCR sales; and by purchasing television airtime to broadcast the film in its
18 entirety in certain markets.

19 Citizens United also plans to produce and air advertisements for the Film in
20 various television, cable, satellite and radio markets in the United States. These
21 advertisements have not yet been prepared. Nonetheless, you anticipate that they will
22 include visual images of Senator Kerry and Senator Edwards and that they will mention

1 the candidates' names, but that they will not expressly advocate the election or defeat of
2 either candidate.

3 ***The Book.*** Mr. Bossie has written a book about Senator Kerry, entitled, *The*
4 *Many Faces of John Kerry, Why This Massachusetts Liberal Is Wrong for America* (the
5 "Bossie Book"). The Bossie Book was published earlier this year by WND Books, a
6 publisher not affiliated with Citizens United, and has been released for sale across the
7 country.

8 You state that Citizens United proposes to market the Bossie Book, even though
9 Citizens United does not own any rights to the Bossie Book, has not entered into any
10 contractual arrangements with Mr. Bossie or with WND Books regarding the Bossie
11 Book, and receives no book royalties. Citizens United has, however, entered into an
12 agreement with Amazon.com, an on-line bookseller, under which Citizens United
13 receives a small commission on certain sales of the Bossie Book by Amazon.com.
14 Specifically, Citizens United receives this commission only if the purchaser accesses the
15 Amazon.com website through a pop-up advertisement and hypertext link on the Citizens
16 United website.⁴ Citizens United does not receive a commission on any other sales of
17 the Bossie Book, such as, for instance, sales made to purchasers who gain access to
18 Amazon.com without first going through the Citizens United website, sales made through
19 WND Books's website, or sales made through bookstores.

20 You state that Citizens United is considering producing and airing advertisements
21 for the Bossie Book in various television, cable, satellite and radio markets throughout
22 the United States. Currently there are no scripts, outlines or treatments for the

⁴ Any website owner willing to include a specially formatted link on its website may enter these agreements under the Amazon Associates Program. According to Amazon.com, "over 900,000 members" have already done so. <http://www.amazon.com/gp/browse.html/103-8193470-6651057?node=3435371>.

1 advertisements, but you anticipate that the advertisements will follow a certain format:
2 television advertisements will display the cover of the Bossie Book, which shows the title
3 of the Bossie Book and three photographs of Senator Kerry; radio advertisements will
4 refer to the Bossie Book by title and will include other references to Senator Kerry; all of
5 the advertisements, both television and radio, will direct viewers and listeners to the
6 Citizens United website, through which they can purchase the Bossie Book from
7 Amazon.com; and none of the advertisements will expressly advocate the election or
8 defeat of Senator Kerry or any other candidate for Federal office.

9 ***Citizens United and the News Media.*** You state that Citizens United considers
10 itself to be part of the news media. As support, you state that Citizens United paid for a
11 nationally syndicated radio talk show in the mid-1990s hosted by Citizens United's then-
12 president, Mr. Floyd Brown,⁵ and that Citizens United is currently negotiating with the
13 owner of an Internet broadcasting company to provide "regular news/issue programs" on
14 the Internet. You also state that Citizens United and Citizens United Foundation (the
15 "Foundation"), which is a tax-exempt organization under 26 U.S.C. 501(c)(3), have
16 published and disseminated various types of informational and editorial materials.
17 Recent examples of these materials include newsletters, position papers, paid "television
18 editorials," a "webmercial," several "investigative reports/policy papers," court filings,
19 and "numerous op-eds" that have been published in such newspapers as the *Washington*
20 *Times*. To the best of your knowledge, however, neither Citizens United nor Mr. Bossie
21 has ever sought or acquired press credentials.

⁵ Mr. Brown has also served as chairman of the board of directors of "the research and lobby organization Citizens United" since 1988. http://www.reaganranch.org/leadership/bios/floyd_brown.htm.

1 You state that Citizens United and the Foundation recently paid to produce and
2 place advertisements in magazines and on the Internet for two other books written by Mr.
3 Bossie. The books are entitled, *Intelligence Failure: How Clinton's National Security*
4 *Policy Set the Stage for 9/11* ("Intelligence Failure"), and *Hand of Providence: The*
5 *Strong and Quiet Faith of Ronald Reagan*. Citizens United entered the same type of
6 agreement with Amazon.com pertaining to the sale of these two books as it has entered in
7 connection with the Bossie Book. Citizens United did not finance any television or radio
8 advertisements for either of Mr. Bossie's previous books.

9 You have provided us with a copy of a full-page magazine advertisement for
10 *Intelligence Failure* paid for by Citizens United. A picture of the book's cover, bearing
11 the book's title and a photograph of former President Clinton, occupies roughly one-
12 quarter of the page. The remaining three-quarters of the page feature statements and
13 quotations criticizing the Clinton administration for alleged intelligence failures.
14 Comparatively small print at the bottom of the page informs readers that the book is
15 "available www.citizensunited.org and at bookstores everywhere."

16 You state that Citizens United and the Foundation also produced and sold two
17 video documentaries during the late 1990s. The video documentaries are entitled,
18 *Sinister Secrets of the U.N.* and *Confidential Report: Bill Clinton, Al Gore and the*
19 *Communist Chinese Connection*. The videos were marketed primarily through direct
20 mail and print advertising. Citizens United did not finance any television or radio
21 advertisements for the videos, nor did it finance any television or radio broadcasts of the
22 videos themselves. Citizens United understands, however, that certain local access cable
23 channels broadcast both videos.

1 ***Questions Presented***

- 2 1. Would Citizens United’s proposed television broadcasts of the Film be
3 electioneering communications within the meaning of the Act and Commission
4 regulations?
- 5 2. Would Citizens United’s proposed television and radio advertisements for the
6 Film and the Bossie Book be electioneering communications within the meaning
7 of the Act and Commission regulations?

8 ***Legal Analysis and Conclusion***

9 Both Citizens United’s proposed television broadcasts of the Film and its
10 proposed television and radio advertisements for the Film and the Bossie Book would be
11 electioneering communications as defined in 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR
12 100.29.

13 Subject to certain exceptions, an electioneering communication is any broadcast,
14 cable or satellite communication that refers to a clearly identified candidate for Federal
15 office and is publicly distributed for a fee within 60 days before a general, special or
16 runoff election for the office sought by the candidate, or within 30 days before a primary
17 or preference election for the office sought by the candidate. *See* 2 U.S.C. 434(f)(3) and
18 11 CFR 100.29; *see also* Advisory Opinion 2004-15. For presidential and vice
19 presidential candidates, “publicly distributed” means that the electioneering
20 communication is disseminated for a fee through the facilities of a television station,
21 radio station, cable television system, or satellite system, and that it can be received

(1) by 50,000 or more people in a State where a primary election or caucus is being held within 30 days; or (2) by 50,000 or more people anywhere in the United States from 30 days before a presidential nominating convention to the end of the convention; or (3) anywhere in the United States within 60 days before the general election. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(b)(3)(ii); and Advisory Opinion 2004-15; *see also* 2 U.S.C. 434(f)(3)(C).

The television broadcasts of the Film and the television and radio advertisements that you describe in your request would be electioneering communications because they meet all of the elements of 2 U.S.C. 434(f)(3) and 11 CFR 100.29. The proposed Film and the proposed advertisements would refer to Senator Kerry, who is a clearly identified candidate for Federal office. *See* 11 CFR 100.29(a)(1). The proposed Film and advertisements would be publicly distributed because you intend to pay television and radio stations to air or broadcast them, and because they would be able to reach people in the United States within 60 days before the upcoming general election.⁶ *See* 11 CFR 100.29(a)(2) and (b)(3)(i).

Furthermore, the proposed Film and advertisements do not fall within any of the six exceptions to the term “electioneering communications.” *See* 2 U.S.C. 434(f)(3)(B)(i)-(iv) and 11 CFR 100.29(c)(1)-(6). First, the Film and advertisements would not be disseminated through means other than broadcast, cable or satellite communication.⁷ Second, they would not be reportable expenditures or independent

⁶ The Commission is not addressing the part of your advisory opinion request that asks about the application of the Act and Commission regulations to the airing of paid advertisements for the Bossie Book and for the Film within 30 days before the 2004 Democratic National Convention. Your request was not completed until July 30, 2004, after the Democratic National Convention had ended. *See* 11 CFR 112.1.

⁷ For example, advertisements using print media (including newspapers or magazines or mailings), and advertisements and films distributed over the Internet (including e-mails), are not electioneering communications. *See* 11 CFR 100.29(c)(1); *see also* Advisory Opinion 2004-07.

1 expenditures.⁸ Third, they would not constitute a candidate debate or forum or promotion
2 of such an event. Fourth, they would not be communications by local or State candidates.
3 Fifth, they would not be made by entities organized under 26 U.S.C. 501(c)(3) because
4 they will be made by Citizens United itself, and not by the Foundation.

5 Finally, the proposed Film and the proposed advertisements are not entitled to the
6 media exception under 2 U.S.C. 434(f)(3)(B)(i). *See also* 11 CFR 100.29(c)(2). The
7 media exception excludes from the term “electioneering communication” any
8 communication “appearing in a news story, commentary, or editorial distributed through
9 the facilities of any broadcast, cable, or satellite television or radio station, unless such
10 facilities are owned or controlled by any political party, political committee, or
11 candidate.” 11 CFR 100.29(c)(2); *see also* 2 U.S.C. 434(f)(3)(B)(i) (the “EC media
12 exception”).

13 Citizens United has described itself as being in the business of issue advocacy. Its
14 Articles of Incorporation and its Mission Statement confirm that Citizens United was
15 founded for that purpose and functions for that purpose. According to the affidavit from
16 the *McConnell* litigation that you provided, “Citizens United engaged in issue advocacy,
17 and has engaged in issue advocacy . . . and it intends to continue doing so.” Bossie
18 Affidavit at 7. Citizens United’s filing for tax exempt status as a Section 501(c)(4) social
19 welfare organization, when coupled with its status under the Act as an incorporated
20 membership organization with an SSF, further support the conclusion that Citizens
21 United is not acting as a media entity in connection with the activities proposed in your

⁸ You have stated that the proposed Film and the proposed advertisements would not expressly advocate the election or defeat of any candidate for Federal office and would not be coordinated with any candidate for Federal office, any candidate’s authorized committee, any Party committee, or their agents. *See* 11 CFR 100.22, 109.20 and 109.21.

1 request.⁹ In fact, in the *McConnell* litigation, Citizens United’s president complained that
2 BCRA discriminated against Citizens United precisely because Citizens United is *not* a
3 part of the news media.¹⁰

4 ***The Media Exception and Advertisements for the Bossie Book***

5 Citizens United has no greater commercial interest in promoting the Bossie Book
6 than does any other entity that might choose to advertise the Bossie Book on its website
7 under the Amazon Associates Program. It is not the publisher of the Bossie Book; it is
8 not the owner of the Bossie Book; and it is not the distributor of the Bossie Book. These
9 facts distinguish the present situation from those addressed in *Reader’s Digest*
10 *Association, Inc. v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981)
11 (“*Reader’s Digest*”), *Federal Election Commission v. Phillips Publishing, Inc.*, 517 F.
12 Supp. 1308 (D.D.C. 1981) (“*Phillips*”), and Advisory Opinions 2004-7 and 2003-34, in
13 which the parties were in the business of either publishing (*Reader’s Digest* and *Phillips*),
14 or producing and distributing (Advisory Opinions 2004-7 and 2003-34) the products that
15 they were promoting.

16 Thus, Citizens United’s proposed advertisements for the Bossie Book would not
17 qualify for the EC media exception for two reasons. First, the advertisements would not
18 “appear in a news story, commentary, or editorial.” 2 U.S.C. 434(f)(3)(B)(i). Second,
19 given that Citizens United is not acting as a media entity in connection with the Bossie

⁹ Although the application of the EC media exception was not an issue in *Wisconsin Right to Life v. Federal Election Commission*, the court in that case concluded that advertisements run by an organization under circumstances that are very similar to those presented here “may fit the very type of activity . . . that Congress had a compelling interest in regulating.” *Wisconsin Right to Life v. Federal Election Commission*, Civil No. 04-1260 (August 17, 2004) at 6.

¹⁰ See Bossie Affidavit at 10. Mr. Bossie stated that Citizens United does not qualify for the expenditure press exemption, either. See *id.* at 7; 2 U.S.C. 441b.

1 Book, its advertising of the Bossie Book cannot be considered part of a “normal,
2 legitimate [media] function.” *Phillips*, 717 F. Supp. at 1313.

3 ***The Media Exception and the Film***

4 Although the Commission has stated that the phrase “news story, commentary and
5 editorial” in the EC media exception includes documentaries,¹¹ not every “documentary”
6 is entitled to the EC media exception. In *Federal Election Commission v. Massachusetts*
7 *Citizens for Life* (“MCFL”), 479 U.S. 238 (1986), the Supreme Court rejected the
8 argument that corporate publications are automatically exempt from the statutory
9 prohibition on corporate and labor union expenditures in connection with Federal
10 elections, under an exception for “any news story, commentary or editorial distributed
11 through the facilities of any broadcasting station, newspaper, magazine, or other
12 periodical publication” (the “press exemption”). 2 U.S.C. 431(9)(B)(i) and 11 CFR
13 100.132; *see also* 2 U.S.C. 441b. The Supreme Court concluded that “a contrary position
14 would open the door for those corporations and unions with in-house publications to
15 engage in unlimited spending directly from their treasuries to distribute campaign
16 materials to the general public, thereby eviscerating [the statutory] prohibition.” *MCFL*,
17 479 U.S. at 251.

18 The *MCFL* Court analyzed a variety of factors that differentiated MCFL’s
19 “Special Edition” publication from the newsletters regularly issued by MCFL. The Court
20 focused on “considerations of form,” such as how the Special Edition was produced and
21 to whom it was disseminated, because “it is precisely such factors that in combination
22 permit the distinction of campaign flyers from regular publications.” *Id.* On the basis of

¹¹ See Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002)

1 these considerations, the Supreme Court concluded that the Special Edition was not
2 eligible for the press exemption.

3 Applying the *MCFL* analysis to the facts here, the Commission concludes that the
4 proposed Film would not be entitled to the EC media exception. Citizens United does not
5 regularly produce documentaries or pay to broadcast them on television. In fact, the
6 information that you provided indicates that Citizens United has produced only two
7 documentaries since its founding in 1988, both of which it marketed primarily through
8 direct mail and print advertising, and neither of which it paid to broadcast on television.
9 Indeed, the very act of paying a broadcaster to air a documentary on television, rather
10 than receiving compensation from a broadcaster, is one of the “considerations of form”
11 that can help to distinguish an electioneering communication from exempted media
12 activity.

13 Mr. Bossie himself has effectively acknowledged that an overly broad reading of
14 the EC media exception would render meaningless the statutory prohibition on corporate
15 financing of electioneering communications. In July 2004, Citizens United filed a
16 complaint with the Commission alleging that Michael Moore, director of the film
17 “Fahrenheit 9/11,” and others involved in the production and distribution of “Fahrenheit
18 9/11,” would violate the electioneering communication prohibitions by advertising the
19 film on television. After filing the complaint, Mr. Bossie stated in an interview that, if
20 the Commission ruled “that ‘Fahrenheit 9/11’ falls under the law’s ‘media exemption’ —
21 and thus Moore can show his ads – well, says Bossie, ‘Citizens United then becomes a

documentary factory.”¹² Mr. Bossie went on to state, “We’ll make documentaries, and we’ll show ads for them. I’m in the production business . . . I can put together a documentary very, very quickly. And do I really have to have the documentary finished before I start advertising it?”¹³

The Media Exception and Advertisements for the Film

The proposed advertisements for the Film would not qualify for the media exception for two reasons. First, the advertisements would not “appear in a news story, commentary, or editorial.” 2 U.S.C. 434(f)(3)(B)(i). Second, given our conclusion that Citizens United would not be acting as a media entity in connection with the Film and that the Film is not entitled to the media exception, Citizens United’s advertising of the Film cannot be considered part of a “normal, legitimate [media] function.” *Phillips*, 717 F. Supp. at 1313.

Taking all of the preceding factors into account, the Commission concludes that Citizens United’s proposed television broadcasts of the Film and its proposed television and radio advertisements of the Film and the Bossie Book would be electioneering communications. Accordingly, the statutory and regulatory requirements governing electioneering communications, which prohibit corporations such as Citizens United from making or financing electioneering communications, would apply.¹⁴ See 2 U.S.C. 434(f); 2 U.S.C. 441b(a) and (b)(2); 11 CFR 104.20; and 11 CFR 114.14(a) and (b).

¹² <http://www.nypost.com/postopinion/opedcolumnists/24628.htm>. The Commission dismissed the complaint against Mr. Moore and the other respondents without reaching the merits of the allegations. See MUR 5467, Certification of Commission Action dated August 4, 2004.

¹³ *Id.*

¹⁴ The electioneering communication source restrictions do not apply to any corporation that is a qualified nonprofit corporation (“QNC”) under 11 CFR 114.10. See 2 U.S.C. 441b(c)(2) and 11 CFR 114.10(d)(2). The Commission assumes that Citizens United is not a QNC, however, because your request states that Citizens United “accept[s] contributions from a variety of sources, including . . . corporations.” See 11 CFR 114.10(c)(4)(ii).

